

))

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1788 of 1999

Hon'ble MR.JUSTICE Y.B.BHATT

=====

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

-----  
PARSHOTTAM RAMAJI RATHOD

Versus

DHIRAJLAL DHARAMSHI MISTRY  
-----

Appearance:

MR NALIN K THAKKER for Petitioners  
-----

CORAM : MR.JUSTICE Y.B.BHATT

Date of decision: 24/06/1999

ORAL JUDGEMENT

1. This is a petition under Article 227 of the Constitution of India wherein the petitioners challenge the order of the Collector rejecting their appeal, and the order of dismissal passed by the Additional Chief Secretary (Appeal) in a Revision arising from the aforesaid appeal.

2. The relevant and pertinent facts leading upto the present petition are as under:

2.1 The petitioners contend that the agricultural lands in question stood in the name of Ghela Khima who was a predecessor of the present petitioners at least upto the year 1964. Thereafter when the said Ghela Khima died, the lands were entered in the name of first respondent as the heir of the deceased Ghela Khima. The relevant entry whereby the name of the first respondent was entered is entry no.1182. The kachha entry was made on 22nd July 1968, and after following the due procedure, the said entry was certified on 17th September 1968. Thereafter in conformation of the aforesaid entry no.1182, the Deputy Collector, after following the due procedure, promulgated a consequential entry no.272 on 29th May 1978, whereby the holding of the lands in question was confirmed in favour of the first respondent. Thereafter the first respondent, as a holder of the said land, sold the same to respondent no.2 by registered sale deed.

2.2 It is pertinent to note here that the sale deed executed on 14th February 1994 has been challenged by the petitioner no.1 by filing Special Civil Suit No.93/95 before the Civil Court, which is still pending. It is also common ground that after the second respondent became the holder of the said land, an application was made to the Collector for conversion of the same into non-agricultural use, which was granted by order dated 12th July 1994.

2.3 Thereafter as late as on 12th October 1995, after 27 years the petitioners challenged the entry numbers 1182 and 272 before the Collector by filing what is called Revision Application No.37/95. It is an admitted fact that although the said proceeding was styled as revision, it was in fact an appeal because only an appeal would lie. It is also conceded that the Collector has treated the same as an appeal and has dealt with the same accordingly.

2.4 The Collector rejected the said appeal by order dated 27th October 1996 by holding that the said appeal was time barred, and beyond the period of limitation, as having been filed 27 years after the certification of the original entry in the year 1968.

2.5 Against the order of the Collector the petitioners preferred a revision being Revision

Application No.4/97 before the Additional Chief Secretary (Appeal). This revision was also dismissed by order dated 13th November 1998.

2.6 The petitioners have, therefore, in the present petition challenged the aforesaid orders under Article 227 of the Constitution of India.

3. Suffice it to say that the present petition under Article 227 of the Constitution of India (although styled as the petition under Article 226 read with Article 14 of the Constitution of India) does not disclose any error apparent on the face of the record, neither is there any indication that the same suffers from any fundamental jurisdictional error. This petition is, therefore, liable to be rejected on this ground alone.

4. Learned counsel for the petitioners, however, contends that both the original appeal before the Collector as also the consequential revision have been rejected basically on the ground that the appeal was time-barred and beyond the period of limitation. In this context it is submitted that the original entries which are the subject matter of the appeal were null and void ab initio and that therefore the very concept of limitation would not apply.

5. With a view to substantiate this proposition, learned counsel for the petitioners seeks to place reliance upon a decision of this Court in the case of Govindbhai Somabhai Nai Vs. State of Gujarat and others, reported at 28(2) GLR page 760.

5.1 With a view to take support from the said decision, learned counsel for the petitioners seeks to place reliance upon observations made in paragraph 13 of the said decision. It must, however, be noted that these observations are made in the context of the suo motu power of revision which could be exercised by the State under section 211 of the Bombay Land Revenue Code. It must be noted that the power exercisable under section 211 is firstly a revisional power and that the same is a suo motu power. It must also be kept in mind that section 211 of the Bombay Land Revenue Code does not prescribe any period of limitation for exercise of such suo motu power.

5.2 However, the Supreme Court in the case of State of Gujarat Vs. Raghav Natha, reported at 10 GLR page 992, had laid down that merely because section 211 does not prescribe a period of limitation for the exercise of

such suo motu power, it would not amount to saying that such powers can be exercised at any point of time. It was further laid down that such power must be exercised within a reasonable period. It must be noted and borne in mind that these observations of the Supreme Court are pertinent only in cases where the statute does not impose any period of limitation, and could not have any application to those cases which are governed by the statute of limitation.

5.3 Secondly, it must be kept in mind that this Court in the case of Govindbhai Somabhai Nai (supra) had made the relevant observations in view of the peculiar facts and circumstances of the case. In that case this Court, while dealing with the observations of the Supreme Court in the case of Raghav Natha (supra), observed that such a principle would not necessarily apply where the order (which is the subject matter of the revision under section 211) is an order which is fundamentally without jurisdiction and has no efficacy in the eye of law. It was in this context the court found that where the order was entirely without jurisdiction, the same could be said to be ab initio void and therefore can be considered to be non-existent, and even if not set aside, the same would have no legal validity or existence. It is in the context of such an order, when it was being examined under section 211 of the Bombay Land Revenue Code, it was held that it was not really necessary for the authority exercising such power under section 211 to hold that the same was void ab initio on the ground of fundamental lack of jurisdiction. Therefore, when it was unnecessary to record such finding, the mere fact that such a finding has been recorded, the same need not be set aside merely on the ground that such finding is recorded in a suo motu proceeding under section 211 of the Bombay Land Revenue Code.

5.4 In fact, as observed hereinabove, the last sentence in paragraph 13 of the said decision specifically recites that the opinion of the court expressed in that case is "in the peculiar facts and circumstances stated above ...."

6. Reverting back to the facts of the case, there cannot be any controversy that the appeal filed by the petitioner before the Collector was in exercise of a statutory right of appeal. It is a well settled principle that the right of appeal is a statutory right and is subject to all the restrictions imposed by the statute which confers that right. It is not an absolute right or an abstract right. The right of appeal is not

merely a statutory right, but it is also a right to resort to a statutory procedure i.e. it is a procedural right and that therefore the same must comply with and must fall within the parameters laid down by the statute which governs the exercise of that right. If the statute conferring that right also imposes a period of limitation for the exercise of such a right, the appeal must be filed within the prescribed period. It goes without saying that if such right is sought to be exercised beyond the period of limitation, it must be held that the right has been extinguished by lapse of limitation.

7. Learned counsel for the petitioner seeks to overcome this hurdle by contending that where the subject matter of challenge in the appeal viz. the entries in question are themselves void ab initio, the very concept of limitation cannot apply. This submission is fallacious for the simple reason that if the relevant entries in question were, in the opinion of the petitioners, null and void ab initio, it was open to the petitioners to ignore their existence, since according to the petitioners, they had no effect in law. It was also open to the petitioners, if their so-called rights were challenged in any proceedings before in any forum, to contend that their rights cannot be challenged on the basis of any entry which is in itself null and void and ab initio. However, the petitioners have not adopted this course. What the petitioners have chosen to do is to approach the appropriate forum specifically for a declaration that the entries are null and void. The petitioners, therefore, have approached the forum for a specific declaration, sought on various grounds including the ground that such entries are null and void. However, it cannot be overlooked that the petitioners are seeking to exercise a statutory right of appeal for the purpose of obtaining such a declaration. Obviously such a declaration could not possibly be obtained by the petitioners except by exercising such statutory right. Once this statutory right is sought to be exercised, as explained hereinabove, such right must be exercised within the period of limitation. It cannot, then be contended that although the right is sought to be exercised beyond the period of limitation, the concept of limitation becomes irrelevant merely because one of the grounds of challenge to the entries is that they are null and void.

7.1 What also cannot be overlooked is that in order to conclude that the entries are null and void or otherwise, the prescribed forum is required to apply its mind to the contentions raised, on the facts and

circumstances of the case, and to record a finding thereon. Obviously such application of mind and the recording of a finding thereafter cannot be achieved by the prescribed forum except by way of prescribed appeal. Thus, without there being a proper appeal i.e. unless the right of appeal is exercised within the period of limitation, the prescribed forum cannot possibly examine the matter on merits and/or to record the finding as prayed for by the petitioners. It also goes without saying that a series of decisions have laid down the principle that the expiration of the prescribed period of limitation extinguishes the procedural right to move the appropriate forum for the reliefs sought, and that the expiration of the period of limitation raises a jurisdictional barrier against that forum examining the case on merits. Thus, if the prescribed forum because of the lapse of limitation has no jurisdiction to examine the petitioner's contention on merits, it could not possibly first come to the conclusion that the entries were null and void and then hold that because the entries are null and void, the concept of limitation has no application at all.

8. The contention raised by the petitioners is, therefore, not sustainable and the same is rejected.

9. No other contention is raised.

10. In the premises aforesaid, I find that there is no substance in the present petition and the same is, therefore, dismissed.

\*\*\*\*\*